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No. 73-824

In the Supreme Court of the United States

OCTOBER TERM, 1973

LAWRENCE F. BECKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 485 F. 2d 51.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1973. On November 5, 1973, Mr. Justice Stewart granted an extension of time within which to file the petition for a writ of certiorari to and including November 26, 1973, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the arresting officers properly adhered to the standards of 18 U.S.C. 3109 in effecting a forced entry of petitioner's residence to arrest him.

2. Whether the warrantless nighttime arrest of petitioner in his home, based upon probable cause, was constitutionally permissible in view of the exigent circumstances with which the law enforcement officers were faced.

3. Whether the search, immediately following petitioner's arrest, of a drawer next to which he was standing was justified as a search incident to an arrest.

4. Whether the holding of the court of appeals—that the finding of the district court (that the entry into petitioner's premises was not a ruse to conduct a general search) was not clearly erroneous—warrants further review.

STATEMENT

After a jury-waived trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of possession of a controlled substance (1,000 tablets of L.S.D.) with intent to distribute it in violation of 21 U.S.C. 841(a)(1). He was ordered committed for observation under 18 U.S.C. 4208(b).[1] The court of appeals affirmed, one judge dissenting (Pet. App. A).

On March 3, 1972, at 10:00 p.m., narcotics undercover agent James Stepp succeeded in purchasing some 15,000 dosage units of L.S.D. from one Jacoboni in a Detroit hotel room. The agent expressed an interest in purchasing another 30,000 units, whereupon Jacoboni placed a telephone call to an individual

[1] No further sentencing has yet occurred.

whom he referred to during the conversation as "Larry". Jacoboni stated to "Larry" that he wanted 30,000 more units and would arrive in thirty minutes to make the purchase. Jacoboni later indicated to Stepp that "Larry" was the source of the original 15,000 units and was the "number two man" in Detroit for such drug distribution (Tr. A. 44–57).[2] At this point Jacoboni was arrested.

Agent Stepp had memorized the telephone number given to the motel operator by Jacoboni, and other agents later confirmed it with the same operator. The agents hurriedly sought to trace the telephone number and by 11:30 p.m. discovered that it was registered in petitioner's name. Not wanting to arouse petitioner's suspicions, since Jacoboni had indicated he would arrive in thirty minutes, and fearing that "Larry" might make further large sales if not expeditiously apprehended, the agents proceeded to petitioner's residence to make an arrest, arriving there at about midnight; they did not first secure an arrest warrant (Tr. B. 40, 27).

Eight agents participated in the arrest. Two agents were sent to the rear of the apartment to prevent an escape, and the others approached the front door (Tr. A. 10–18). They knocked at petitioner's door and identified themselves; there being no response after a few moments, the agents pushed open the apartment door (Tr.A. 69–71; Tr.B. 8–9).

[2] "Tr.A." denotes the transcript of the May 22, 1972, hearing on the motion to suppress. "Tr.B." denotes the transcript of the second day of the hearing, on June 28, 1972.

Petitioner, who was sitting on a couch, was immediately directed by one agent to a nearby wall and told to place his hands against it. While not physically resisting, he was not cooperative and several times dropped his hands and attempted to turn around. After petitioner finally acceded to demands to stand against the wall, two agents searched his person and the area immediately around him, including a chest of drawers located within four feet of him. In the top drawer of the chest, approximately 1,000 L.S.D. tablets were discovered in a clear plastic bag (Tr. A. 74, 80, 91–95; Tr. B. 15). After this search, petitioner's arms were bound and he was taken to the Detroit federal building for arrest processing.[3]

ARGUMENT

1. Petitioner contends that the forcible entry into his residence to effect his arrest was invalid. It has been held that the validity of an entry to make a warrantless arrest is to be tested by criteria identical to those found in 18 U.S.C. 3109, dealing with entry to execute a search warrant. *Miller* v. *United States*, 357 U.S. 301, 306; *Sabbath* v. *United States*, 391 U.S. 585, 588. That section permits forcible entry when an officer is refused admittance after announcement of his

[3] Other agents examined the remaining rooms of the apartment. No other persons were found, although other quantities of drugs were discovered. These drugs, however, were found to be inadmissible by the district court. Even if that broader search was rightly found to have been unlawful, it would not invalidate prior lawful conduct. *United States* v. *Artieri*, C.A. 2, No. 73-1771, decided January 23, 1974.

authority and purpose.[4] Here, the district court specifically found that the officers had announced both their identity and their purpose and had waited a reasonable time thereafter before opening the door to petitioner's apartment after receiving no response (Pet. App. C, pp. 57–58). Agents Mahon and Finnigan both testified that the latter had knocked at petitioner's door and in a loud voice announced the agents' presence and purpose (Tr. A. 69–71; Tr. B. 8–9). Petitioner's contention that the agents had no reason to believe that he was at home is belied by the phone call to him by Jacoboni made two hours earlier, coupled with the lights and television being on when the officers arrived at the apartment.[5]

[4] Section 3109 provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

[5] Petitioner urges that, for there to be a refusal permitting forced entry, some affirmative act of refusal by an occupant must have been observed, rather than a silence such as greeted the agents in this case (Pet. 31). However, the cases cited in support of this argument (with one possible exception, *United States* v. *Chambers*, 382 F. 2d 910 (C.A. 6)) do not specify this requirement, but rather are merely cases in which some activity evidencing refusal was observed by the arresting officers involved. Indeed, *United States* v. *Angello*, 368 F. 2d 692, 694 (C.A. 3), cited by petitioner, explicitly held that a "refusal is present where it can reasonably be inferred from the actions or inaction of the occupants of the premises to be searched." Similarly, *United States* v. *Wylie*, 462 F. 2d 1178 (C.A. D.C.), and *Bosley* v. *United States*, 426 F. 2d 1257 (C.A. D.C.), were both instances in which the arresting officers entered the premises involved upon receiving no response to their announcement of presence and purpose.

2. Petitioner further contends that the nighttime entry into his residence and subsequent warrantless arrest constituted a violation of his Fourth Amendment rights. In *Jones* v. *United States*, 357 U.S. 493, 499–500 (see also *Coolidge* v. *New Hampshire*, 403 U.S. 443, 480–482), the Court questioned

> * * * whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment.

Our position is that the issue posed by the Court is not present in this case, because there was ample justification for petitioner's arrest without an arrest warrant.

When agent Stepp purchased 15,000 units of LSD from Jacoboni, he was told that a man named "Larry" was Jacoboni's source and that this Larry was the "number two man" in the Detroit area for such drug distribution (Tr. A. 54–55). The telephone number called by Jacoboni, which was confirmed with the hotel operator, was indeed registered to a Larry Becker. The agent specifically heard Jacoboni converse with "Larry" and order 30,000 more units, which were to be picked up within thirty minutes.[6] In these circum-

[6] On these facts, petitioner's claim (Pet. 34), echoing the dissent below, that probable cause was lacking for his arrest, in part because it was not proven "that there was anyone at the other end of Jacoboni's telephone conversation" (Pet. App.

stances, the law enforcement officers quite reasonably feared that, if time were spent securing a warrant (some time already having passed in tracing the telephone number), petitioner would become suspicious and possibly flee, having been told by Jacoboni that he would arrive in thirty minutes. Similarly, given the apparent volume of petitioner's illicit business, the agents reasonably sought to arrest him as quickly as possible in order to prevent further massive deliveries of illegal drugs. The exigencies of the situation thus dictated an immediate arrest.

3. It is additionally argued that the search of the drawer near which petitioner was standing following his arrest was impermissible under *Chimel* v. *California*, 395 U.S. 752, because petitioner was fully secured and did not pose a threat to the officers. Specifically, petitioner refers to testimony by two of the agents that, when the drawer was opened to look for weapons, no immediate danger was anticipated by them from petitioner (Pet. 7; see also the dissenting opinion below, Pet. App. B, pp. 55–56). As agent Mahon explained, however, petitioner was secure in the sense that Mahon and agent Finnigan could safely commence to search his person and the surrounding area for weapons (Tr. A. 74, 80, 91). Prior to that, petitioner persisted in turning around and refused generally to cooperate, thus preventing the officers from conducting

B, p. 48), is without substance. The agents could reasonably assume that Jacoboni, who had already provided 15,000 units of drugs from a described source, and who called a "Larry" at a number registered to a Lawrence Becker, had in fact conversed with petitioner.

even a rudimentary security check (Tr. A. 74; Tr. B. 15). The fact that petitioner finally acceded to the agents' demands that he keep his hands against the wall did not eliminate all danger and need for a search, for his person had not been searched for weapons, there was no one standing between him and the drawer which was opened by agent Mahon, and, at the time of the opening (Tr. B. 23), as the trial court judge specifically determined, petitioner's arms had not been bound (Tr. B. 23).[7] Thus, the facts of this case bring it within the ambit of permissible searches incidental to arrests as spelled out in *Chimel, supra*, 395 U.S. at 763:

> A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.[8]

Compare *People* v. *Fitzpatrick*, 32 N.Y. 2d 499, 508–509, certiorari denied, No. 73–5370, November 19, 1973.

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[7] The dissenting opinion below suggests that a long period elapsed before the drawer was searched, concluding that the search was not therefore performed for security reasons. Agent McKinnon, however, who was in charge of the arrest party, testified that the drawer was in fact searched within a minute of the agents' entry into the apartment (Tr. B. 34).

[8] As for the fact that, when the search of petitioner and the immediately surrounding area was conducted, agents Finnigan and Mahon had replaced their pistols in their respective holsters, it was explained by the former that they had been

Moreover, since the search came within the traditionally recognized area of permissible search incident to arrest, a specific showing of justification for the particular actions of the arresting officers is not required. See *United States* v. *Robinson*, No. 72–936, decided December 11, 1973.

4. Finally, petitioner alleges that the arrest constituted a pretext for a search of his residence. This claim is without substance for two reasons.

First, the district court specifically found as a fact, from the testimony of the agents, that their purpose in proceeding to petitioner's residence was to secure his arrest (Pet. App. C, p. 60). Agents Finnigan, Mahon, and McKinnon, the latter being in charge of the group which arrested petitioner, all testified that the purpose of the entry into petitioner's residence was to arrest Becker for conspiring to distribute drugs (Tr.A. 62; Tr.B. 5, 28).[9] The fact that eight agents went to the resi-

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trained, reasonably we submit, never to engage in a personal search of an arrestee with a weapon exposed to a sudden grasp (Tr. B. 24).

The suggestion of the dissenting judge below, endorsed by petitioner, that the need for a search of the immediate area might be obviated merely by hurriedly transporting the arrestee from the premises can hardly be deemed sound. To require police officers immediately to remove an arrestee from the place of his arrest, without first binding his arms or searching for weapons within reach, involves an unacceptable risk to the safety of the law enforcement officers.

[9] The dissenting opinion below stated that only agent Finnigan's testimony supported the view that the purpose of the entry was to effect an arrest and implied that his testimony was modified because he had testified some days after the other agents. The record does not bear out either this factual statement or the attendant implication. In fact, both Finnigan and

dence to make the arrest does not, as the dissent below suggests, imply a contrary purpose, for, as agent Mahon testified, this number was not deemed inordinately large considering petitioner's reputation as the "number two man" for drug distribution in the Detroit area (Tr.A. 62). Such an individual might well be expected to be dangerous or to be accompanied by others. Nor does the fact that various agents were assigned to different rooms of the apartment suggest a search purpose, for the agents, understandably, wished for security purposes to ascertain if any individuals besides petitioner were in the residence. Cf. *United States* v. *Looney*, 481 F. 2d 31 (C.A. 5), certiorari denied, No. 73–5364, December 3, 1973.

Second, even if the purpose of the law enforcement officers was to gain entry into petitioner's apartment, there was ample basis for them to do so without a warrant. There was probable cause to believe that contraband was present, and there was a real possibility that, if they delayed in order to obtain a warrant

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McKinnon testified on June 28, 1972, as to the arrest purpose of the entry. In addition, on May 22, 1972, the first day of the hearing on the motion to suppress, agent Mahon also testified to the same effect (Tr.A. 60, 62). The testimony of agent Ray, alluded to by the dissenting judge (Pet. App. B, p. 49), does not, in fact, contradict the statements of these agents. Ray merely indicated that, prior to the agents' departure to petitioner's apartment, he had been told the information relayed by agent Stepp, namely that petitioner was believed to be prepared to sell 30,000 units of drugs and that the agents were going to "find out" (Tr.A. 15). Ray also stated that no discussion of a search occurred prior to the agents' entry into the apartment (Tr.A. 19).

(possibly until the next morning), the illicit drugs would no longer be there. Under these circumstances, it is submitted, "time was clearly of the essence," and the entry without a warrant was valid. Cf. *Warden* v. *Hayden*, 387 U.S. 294, 298–299; *Ker* v. *California*, 374 U.S. 23, 41–42. As the Court observed in *Ker* (distinguishing other cases in which warrantless searches had been held invalid) (374 U.S. at 42, n. 13)):

> In cases in which a search could not be regarded as incident to arrest because the petitioner was not present at the time of the entry and search, the absence of compelling circumstances, such as the threat of destruction of evidence, supported the Court's holdings that searches without warrants were unconstitutional. See *Chapman* v. *United States*, 365 U.S. 610, 615 (1961); *United States* v. *Jeffers*, 342 U.S. 48, 52 (1951); *Taylor* v. *United States*, 286 U.S. 1, 5 (1932).

Here, we submit, the same exigent circumstances which justified an arrest without a warrant likewise justified an entry into petitioner's premises without a warrant to ensure that the contraband would not be removed or destroyed. Accordingly, it is immaterial what the law enforcement officers' purpose was in entering the apartment.

Finally, we note that the court of appeals held that the finding of the district court "that the officers had as their purpose the arrest of Becker, and that the arrest was not a mere ruse to conduct a search, is not

clearly erroneous" (Pet. App. A, p. 45).[10] The only issue, therefore, is whether that determination was clearly erroneous. Cf. *Neil* v. *Biggers*, 409 U.S. 188, 193, n. 3. We submit that it was not and that this factual issue does not warrant further review.

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[10] The court of appeals, although satisfied that the district court's finding was not clearly erroneous, went on to observe that "this matter deserves comment" (Pet. App. A, p. 45):

> *The Constitution contemplates that searches will be made upon the basis of a prior determination of necessity by a disinterested magistrate.* *McDonald* v. *United States*, 335 U.S. 451, 455 (1958). *The warrantless search remains the exception which must be justified. Where the justification relied upon is that the search is a necessary incident to a lawful arrest the restricted scope of this exception must be observed.* This is especially true where the search is conducted in a person's home at night. Such warrants issued pursuant to Rule 41, Fed. R. Crim. P. are subject to the following limitation:
>
> "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. Fed. R. Crim. P. Rule 41(c)." [Emphasis in original.]

While we do not take issue with the general tenor of this statement, we note that former Rule 41, Fed. R. Crim. P., to which the court of appeals alluded, was inapposite here. Nighttime searches for "controlled substances" are not governed by Rule 41(c), but by 21 U.S.C. 879(a), which has been construed by every appellate court that has considered the issue to permit such searches without any special showing beyond that of probable cause. *United States* v. *Thomas*, 489 F. 2d 664, 673–674 (C.A. 5); *United States* v. *Thomas*, 294 A. 2d 164 (D.C. Ct. App.), certiorari denied, 409 U.S. 992; *United States* v. *Gooding*, 477 F. 2d 428 (C.A. D.C.), certiorari granted, 414 U.S. 907.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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